

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

Jevyn Berney,  
Plaintiff  
v.  
Southern Desert Correctional Center, et al.,  
Defendants

2:15-cv-00888-JAD-VCF

## Order Denying as Moot application to proceed *in forma pauperis*, Granting Motion to Dismiss, and Dismissing and Closing Case

[ECF Nos. 1, 13]

10 Pro se Nevada State prison inmate Jevyn Berney filed this civil-rights case against John Doe  
11 Doctor, John Doe Nurse, and John Doe Officer. I gave Berney an opportunity to conduct limited  
12 discovery to identify these defendants,<sup>1</sup> but that period came and went without any effort by Berney  
13 to identify them. Nevertheless, he timely filed an amended complaint identifying John Doe Officer  
14 as “Unit Officer Williams.”<sup>2</sup> Defendants moved to dismiss, arguing that they were unable to  
15 determine which of three possible Officer Williamses is the Williams who allegedly harmed Berney  
16 and that, because Berney failed to conduct any discovery to identify the appropriate individual  
17 defendants despite having the opportunity to do so, this entire action should be dismissed.<sup>3</sup>

18 Noting that dismissal for failing to conduct discovery is a drastic sanction,<sup>4</sup> I granted in part  
19 and denied in part defendants' dismissal motion: I dismissed all claims against John Doe Doctor and  
20 John Doe Nurse without prejudice under Rule 4(m), but I granted Berney leave to serve three  
21 interrogatories on the Attorney General to discover which Officer Williams is the one who allegedly

<sup>1</sup> ECF No. 8.

<sup>2</sup> ECF No. 9.

<sup>3</sup> ECF No. 11.

<sup>4</sup> ECF No. 12 at 1

1 harmed him.<sup>5</sup> I gave Berney until September 16, 2016, to serve these interrogatories on the Attorney  
 2 General's Office and instructed him to notify the court of Officer Williams's identity within 15 days  
 3 of the Attorney General's response. I warned Berney that, if he failed to timely identify Officer  
 4 Williams, this case would be dismissed without prejudice.

5 Berney has not filed a notice or otherwise responded to that order. Defendants now move to  
 6 dismiss all claims against defendant Officer Williams, representing that they have not received any  
 7 formal or informal written-discovery requests from Berney.<sup>6</sup> Berney received the notice required  
 8 under *Klingele v. Eikenberry* and *Rand v. Roland*,<sup>7</sup> but he has not responded to defendants' dismissal  
 9 motion or requested an extension to do so. This district's local rules state that the failure of an  
 10 opposing party to file points and authorities in response to any motion, except a motion for summary  
 11 judgment or a motion for attorney's fees, constitutes a consent to the granting of the motion.<sup>8</sup>

12 A court may dismiss an action based on a party's failure to obey a court order or to comply  
 13 with local rules.<sup>9</sup> In determine whether to dismiss an action on these grounds, I must consider (1) the  
 14 public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3)  
 15 the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their  
 16 merits; and (5) the availability of less drastic sanctions.<sup>10</sup>

17 The first two factors—the public's interest in expeditiously resolving this litigation and the  
 18 court's interest in managing the docket—weigh in favor of dismissal. The third factor, risk of  
 19 prejudice to defendants, also weighs in favor of dismissal because a presumption of injury arises from  
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21 <sup>5</sup> *Id.* at 2.

22 <sup>6</sup> ECF No. 13.

23 <sup>7</sup> ECF No. 14.

24 <sup>8</sup> L.R. 7-2(d).

25 <sup>9</sup> See *Ghazali v. Moran*, 46 F.3d 52, 53–54 (9th Cir. 1995) (dismissal for noncompliance with local  
 26 rule); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260–61 (9th Cir. 1992) (dismissal for failure to comply  
 27 with court order).

28 <sup>10</sup> *Ghazali*, 46 F.3d at 53.

1 the occurrence of unreasonable delay in filing a pleading ordered by the court or prosecuting an  
2 action.<sup>11</sup> Additionally, a court's warning to a plaintiff that his failure to obey the court's order will  
3 result in dismissal satisfies the fifth factor's "consideration of alternatives" requirement.<sup>12</sup> The  
4 fourth factor—the public policy favoring disposition of cases on their merits—is greatly outweighed  
5 by the factors favoring dismissal. I therefore dismiss this action without prejudice for failure to  
6 comply with my August, 17, 2016, order and failure to oppose defendants' dismissal motion.

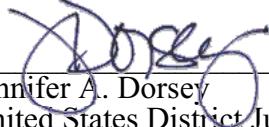
7 **Conclusion**

8 Accordingly, IT IS HEREBY ORDERED that defendants' motion to dismiss [ECF No. 13]  
9 is GRANTED. This case is DISMISSED without prejudice.

10 IT IS FURTHER ORDERED that Berney's application to proceed *in forma pauperis* [ECF  
11 No. 1] is DENIED as moot.

12 The Clerk of Court is instructed to CLOSE THIS CASE.

13 Dated: November 1, 2016.

14   
15 Jennifer A. Dorsey  
United States District Judge

27 <sup>11</sup> See *Anderson v. Air West*, 542 F.2d 522, 524 (9th Cir. 1976).

28 <sup>12</sup> *Ferdik*, 963 F.2d at 1262.